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Supreme Court, U.S.

FILED

JUL 20 1990

IN THE SUPREME COURT OF THE UNITED STATES, JR.

CLERK

NO. _____

OCTOBER TERM, 1989

THE PEOPLE OF THE STATE OF MICHIGAN

PETITIONER

v

NOLAN K. LUCAS

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE MICHIGAN COURT OF APPEALS

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STATEMENT OF THE QUESTION PRESENTED

SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT IS VIOLATED BY EXCLUSION OF ARGUABLY RELEVANT EVIDENCE TO BE USED ON CROSS-EXAMINATION OF A SEXUAL ASSAULT VICTIM FOR FAILURE TO FILE A REQUIRED NOTICE OF INTENT TO EMPLOY SUCH EVIDENCE (THEREBY OBTAINING A PRETRIAL HEARING ON ITS ADMISSIBILITY/LEGAL RELEVANCE)?

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NOW COMES the State of Michigan, Petitioner, through John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Don W. Atkins, Principal Attorney, Appeals and prays that a writ of certiorari issue to review the judgment of the Michigan Court of

Appeals entered on April 23, 1987, order remanding the cause to the Court of Appeals by the Michigan Supreme Court entered on September 27, 1989, judgment and opinion (on remand) of the Michigan Court of Appeals entered on March 7, 1990 and order denying leave to appeal entered by the Michigan Supreme Court on June 5, 1990.

OPINIONS AND ORDERS BELOW

The April 23, 1987 opinion of the Michigan Court of Appeals is reported at 160 Mich.App. 692; 408 N.W.2d 431 (1987) and is appended below as Appendix A. The September 27, 1989 order of the Michigan Supreme Court is reported at 433 Mich. 878 (1989) and is appended below as Appendix B. The March 7, 1990 opinion of the Michigan Court of Appeals (on remand) is unreported and is appended below as Appendix C. The June 5, 1990 order of the Michigan Supreme Court denying leave to appeal is appended below as Appendix D.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on April 23, 1987. The Michigan Supreme Court remanded the cause to the Michigan Court of Appeals by order dated September 27, 1989. The judgment of the Michigan Court of Appeals (On Remand) was entered on March 7, 1990. The Michigan Supreme Court entered judgment denying leave to appeal on June 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that in all criminal prosecutions the accused shall have the right "to be confronted with the witnesses against him."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

For a period of six to seven months prior to August 31, 1984, the Respondent and the complainant maintained a boyfriend-girlfriend relationship which had ended two weeks prior to that date. Late in the evening of August 31, 1984, the Respondent forced the complainant to his apartment at knifepoint where the Respondent beat the complainant and forced her to perform fellatio and to have sexual intercourse. Later that night, the Respondent forced the complainant to engage in a second act of sexual intercourse.

Defendant was charged with two counts of criminal sexual conduct in the first degree. The case was tried without a jury. The Respondent's defense at trial was that he and the complainant had

voluntary consensual sex three or four times and that he did not use a knife or other force.

On the opening day of trial, defense counsel made a motion to admit evidence of past sexual conduct between the defendant and the complainant. Based only upon the Respondent's failure to comply with the notice requirement of the rape shield law [MCL 750.520j(2); MSA 28.788(10)(2)], the motion was denied. Despite this ruling, evidence of a prior intimate relationship was admitted at trial. On May 15, 1985, the Respondent was found guilty of the lesser offense of criminal sexual conduct in the third degree as to both counts.

On April 23, 1987, the Michigan Court of Appeals reversed the Respondent's conviction and remanded the matter for a new trial on the grounds that the notice requirement of MCL 750.520j(2); MSA 28.788(10)(2) was unconstitutional, being violative of the Respondent's right

of confrontation. This provision precludes the admission of evidence of a defendant's prior sexual contact with a complainant where the defendant fails to file a timely notice of his intent to present such evidence. The court stated, in pertinent part, as follows [People v Lucas, 160 Mich.App. 692, 694; 408 N.W.2d 431, (1987)]:

In People v Williams, 95 Mich App 1, 9-11; 289 NW2d 863 (1980), rev'd on other grounds, 416 Mich 25 (1982), this Court found the ten-day notice provision and any hearing requirement unconstitutional when applied to preclude evidence of specific instances of sexual conduct between a complainant and a defendant.

Petitioner filed a delayed application for leave to appeal in the Michigan Supreme Court on the grounds that the Court of Appeals erred holding that the notice provision of MCL 750.520j(2); MSA 28.788(10)(2) was unconstitutional. The application emphasized the fact that despite having granted leave on the question of the constitu-

tionality of the notice requirement the court in People v Williams, 416 Mich. 25; 330 N.W.2d 823 (1982) specifically stated that it was unnecessary to resolve that issue because the evidence which the defendant sought to introduce was irrelevant (416 Mich at 32; 330 N.W.2d at 825).

On September 27, 1989, the Michigan Supreme Court issued the following order of remand [433 Mich 878 (1989)]:

In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for determination of whether the trial court's denial of the defendant's motion to introduce evidence regarding past sexual relations between him and the complainant was harmless beyond a reasonable doubt.

On March 7, 1990, the Michigan Court of Appeals again reversed the Respondent's conviction and stated as follows (see Appendix C):

As we noted in our previous opinion, defendant and complainant had a "boyfriend-girlfriend" relationship over a considerable period of time in

which they saw each other practically every day. Their relationship experienced difficulties only shortly before the incident in question. Virtually all of the evidence in this case consisted of complainant's word against the word of defendant. As this Court suggested in People v Williams, 95 Mich App 1, 10; 289 NW2d 863 (1980), rev'd on oth grds, 416 Mich 25 (1982), the prior instances of sexual relation between these individuals goes to the issue of credibility. Since the question of credibility was central to this case, we cannot say exclusion of defendant's proposed testimony was harmless beyond a reasonable doubt. People v Robinson, 386 Mich 551, 563; 194 NW2d 709 (1972).

On June 5, 1990, the Michigan Supreme Court entered an order denying Petitioner's application for leave to appeal.

REASONS FOR GRANTING THE WRIT

MCL 750.520j(2); MSA 28.788(10)(2) provides, in pertinent part, as follows:

If the defendant proposes to offer evidence described in subsection (1)(a) [(e)vidence of the victim's past sexual conduct with the actor] or (b), the defendant within 10 days after the arraignment on the information shall file a written

motion and offer proof.
(emphasis added)

Even if a timely motion is filed, this subsection leaves the decision of whether to conduct an in camera hearing to determine the admissibility of the proposed evidence to the sound discretion of the trial court. Also, if new information is received during trial which may indicate the admissibility of such evidence, the trial court may in its discretion conduct an in camera hearing.

The Michigan Court of Appeals in the instant case placed its reliance almost exclusively upon that portion of the decision of another panel of the Court of Appeals in People v Williams, 95 Mich.App. 1, 9-11; 289 N.W.2d 863, 866-867 (1980) which held the notice requirement to be unconstitutional. In her dissenting opinion, then-Judge Riley noted that she would not address the issue raised by two of the defendants that their right of confrontation was

denied due to the exclusion of reputation evidence due to their failure to comply with the statute's notice provision (95 Mich.App. at 16; 289 N.W.2d at 869).

In authoring a separate opinion which agreed with the majority's decision to reinstate the defendants' conviction in People v Williams, 416 Mich. 25; 330 N.W.2d 823 (1982), Justice Kavanagh specifically addressed the question for which leave had been granted; namely, whether "the application of MCL 750.520j; MSA 28.788(10) violate[d] defendants' Sixth Amendment rights to confrontation and cross-examination". 416 Mich. at 46-47; 330 N.W.2d at 832. The "application" referred to was the trial court's enforcement of the notice requirement to bar admission of evidence of reputation evidence and prior sexual conduct between the complainant and Defendant Williams to establish consent. In flatly rejecting the majority decision by the Michigan Court of Appeals, Justice Kavanagh

explained his reasons for upholding the constitutionality of the notice provision (416 Mich. at 47-48; 330 N.W.2d at 832):

The notice requirement serves the purpose of ensuring that a victim's sexual past will not be exposed to public scrutiny without an in camera determination that such evidence is more probative than prejudicial.

The state has a legitimate interest in encouraging victims to report criminal sexual conduct and to assist in prosecutions therefor. So long as efforts such as this statute to further this purpose do not infringe on a defendant's constitutional right to confront his accusers and produce evidence in his own behalf, they are permissible.

The procedural requirement of notice so that an in camera hearing may determine the appropriate action to serve both ends appears to us as proper and adequate.

We find no error in the trial court's ruling that the evidence proffered here was inadmissible because of the failure to observe the notice requirement.

In this case, the Michigan Court of Appeals relied upon its discredited prior decision in Williams to state that the

prosecution has no need of notice in a situation where sexual conduct between the complainant and the defendant is in question.

The court also found that the statutory provision requiring an in camera hearing to determine the admissibility of such evidence (when a timely motion to admit the evidence has been filed) lacked constitutional validity because the trial court's consideration of the question of whether to admit the proffered evidence necessarily removes the issue of the relative credibility of the defendant and the complainant from the factfinder.

Rape Shield Laws have been enacted throughout the United States. Courts of the various states have repeatedly rejected claims that the statute violates an accused's Sixth Amendment right of confrontation. See e.g. Isom v. State, 655 S.W.2d 405 (Ark. 1983); Kelly v. State, 452 N.E.2d 907 (Iowa 1983); Smith v. Commonwealth, 566 S.W.2d 181 (Ky.App. 1978).

In at least eight states including Michigan, statutory provisions may be found which require the filing of a written motion to permit the defense to inquire into the prior sexual relationship between the accused and the complainant. These filing requirements establish varying periods of time within which such a motion may be filed before the commencement of trial. See Tanford and Bocchino, "Rape Victim Shield Laws and the Sixth Amendment," 128 U.of Penn.L.Rev. 544 (1980). The Federal Rules of Evidence mandate that such a motion be filed not later than fifteen days before the start of trial. 28 U.S.C.A. Rule 412(c)(1).

Other courts have rejected the claim that the application of the notice provision of a rape shield statute to preclude the introduction of evidence of prior sexual relations between the accused and the complainant is unconstitutional as a violation of the Sixth and Fourteenth

Amendments. The Supreme Courts of the State of Iowa [State v. Ogilvie, 310 N.W.2d 192 (Iowa, 1981)] and the State of Kansas [State v. Williams, 580 P.2d 1341 (Kansas, 1978)] have specifically rejected such constitutional challenges. This split between the Supreme Court of Michigan and the supreme courts of other states which have reviewed the question should be resolved.

In Smith v. Jago, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed. 2d 836 (1985), this Court denied certiorari over the dissent of Justice White, joined by the Chief Justice and Justice Brennan. In that case, the testimony of defense alibi witnesses was excluded for failure to meet a state law requirement that notice be given a particular number of days prior to trial [the state rule requiring reciprocal discovery by the prosecution of any rebuttal witnesses, see Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973)]. Exclusion of the

witnesses as a sanction was held appropriate by the federal district court in habeas and affirmed by the Sixth Circuit. Justice White's dissent from the denial of certiorari noted a split in the federal circuits as to whether "the compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants."

The present case involves not the compulsory process clause of the Sixth Amendment, but the confrontation clause. However, the issues appear very similar. Here, the question concerns exclusion of arguably relevant evidence for failure to file a timely notice and obtain the appropriate hearing as to whether the proposed evidence in cross-examination of the victim would be relevant (it cannot be said that the defendant in such cases has lost relevant evidence; he has lost the opportunity to demonstrate its relevance).


CONCLUSION

The Federal Rules of Evidence, and many states, have rules requiring the filing of timely motions to permit the admission of evidence of prior sexual relations between an accused and a complainant, with exclusion as a remedy. Unlike Michigan, those which have considered the question have upheld the constitutionality of the notice/exclusion requirements. This Court should grant plenary review to resolve this important question.

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the Michigan Court of Appeals, and remand the cause for proceedings consistent with this Court's opinion.

Respectfully submitted,

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Dated: July 9, 1990

TAB/DWA/mlw

APPENDICES

APPENDIX "A"

COURT OF APPEALS OPINION

April 23, 1987

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

No. 86789

NOLAN K. LUCAS,

Defendant-Appellant.

Before: J.H. Shepherd, P.J., R.S.
Gibbs & R.R. Lamb,* JJ.

PER CURIAM

In a bench trial, defendant was found guilty of two counts of criminal sexual conduct in the third degree, MCL 750.520d; MSA 28.788(4). On July 2, 1985, defendant was sentenced to a prison term of 44 to 180 months. Defendant appeals by right, raising three issues, one of which requires reversal.

*Circuit judge, sitting on the Court of Appeals by assignment.

Defendant's defense at trial was consent. As of August 31, 1984, defendant and complainant had been boyfriend and girlfriend for approximately six to seven months. Complainant testified that they broke up two weeks before that date. On August 31, 1984, complainant stated that defendant, at knifepoint, forced her to his apartment. Complainant testified that she was physically beaten and forced to perform fellatio and have sexual intercourse and later that night defendant again forced her to have sexual intercourse with him. Complainant, however, did not leave defendant's home until 10:00 or 10:30 p.m. on September 1, 1984. It was defendant's position at trial that he and complainant had voluntary consensual sex three or four times and that he did not use a knife or other force.

At the start of trial, defendant moved for the introduction of evidence of the prior sexual relationship between

defendant and complainant. Based solely upon the failure of defendant to comply with the notice provision of subsection 2 of the rape shield statute, MCL 750.520j; MSA 28.788(10). The trial court, without holding an in camera hearing to determine the admissibility of the proposed evidence, denied defendant's motion. This was clear legal error.

In People v Williams, 95 Mich App 1, 9-11; 289 NW2d 863 (1980), rev'd on other grds, 416 Mich 25 (1982), this Court found the ten-day notice provision and any hearing requirement unconstitutional when applied to preclude evidence of specific instances of sexual conduct between a complainant and a defendant. The Court explained:

The object behind imposition of a notice requirement is to allow the prosecution to investigate the validity of a defendant's claim so as to better prepare to combat it at trial. This rationale is sound when applied to notices of alibi and insanity defenses. It loses its logical underpinnings

however when applied to the instant situation. As stated, the very nature of the evidence sought to be presented, i.e., prior instances of sexual conduct between a complainant and a codefendant, is personal between the parties. As such, it does not involve a subject matter that requires further witnesses to develop. An in camera hearing will necessarily focus on a complainant's word against the word of a codefendant. Requiring notice in this situation, then, would serve no useful purpose. There would be no witnesses to investigate and, thus, no necessity for preparation time. In view of the foregoing, we find that the trial court's denial of codefendant Williams' proffered evidence represents a consideration of form over substance. The evidence should have been admitted despite noncompliance with the notice provision. This ten-day notice provision loses its constitutional validity when applied to preclude evidence of previous relations between a complainant and a defendant." Id.

As noted by the Supreme Court in reversing the Court of Appeals, defendants in Williams sought to introduce evidence of prior sexual conduct between defendant Williams and

the complainant on the premise that such evidence would be probative to the claim of all four defendants that complainant consented to have group sexual relations with defendant Williams and his three codefendants, one after the other. Williams, 416 Mich at 36-37. The Supreme Court found this premise untenable. Id., 37. Thus, any evidence of prior sexual conduct by complainant with Williams was properly excluded as it bore no logical relevance as substantive evidence to the Williams defendants' defense of consent to group sex. Id., 38.

The instant case was not one where complainant sought to introduce the fact of prior sexual conduct between complainant and defendant as substantive evidence that complainant would consent to any type of group sexual encounter. Here, defendant and complainant had a relationship over a considerable period of time in which they saw each other

practically every day. The evidence supported the inference that only shortly before the incident in question had their relationship experienced difficulties or ended. Consequently, the issue of consent has considerably more probative validity here than in Williams. We conclude that this Court's holding in Williams remains valid under the circumstances of this case.

As was explained in People v Perkins, 424 Mich 302, 307-308; 379 NW2d 390 (1986), while the interests sought to be protected by the rape shield statute are not involved where the proposed testimony relates to sexual activity between the complainant and the defendant, what is left is the usual evidentiary issues of the materiality of the evidence to the issues in the case and the balancing of its probative value with the danger of unfair prejudice. The trial court did not exclude the proposed

testimony here on either of those grounds. Nor does the record itself allow us to say it would have been proper for the proposed testimony to be excluded on either of those grounds. Therefore, defendant's conviction must be reversed.

Reversed and remanded.

/s/ John H. Shepherd
/s/ Roman S. Gribbs
/s/ Richard R. Lamb

APPENDIX "B"

MICHIGAN SUPREME COURT ORDER

Entered: September 27, 1989

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NOLAN KEITH LUCAS,

Defendant-Appellee.

SC: 80845
COA: 86789
LC: 84-479160

By order of July 24, 1987, the application for leave to appeal was held in abeyance pending the decision in People v LaLone (Docket No. 79221). On order of the Court, the decision having been issued on March 30, 1989, 432 Mich 103, the application is again considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for determination of whether the trial court's denial of the defendant's motion to introduce evidence regarding pas sexual relations between him and the

complainant was harmless beyond a reasonable doubt.

We do not retain jurisdiction.

I CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

/s/ Corbin R. Davis
Clerk

Seal

APPENDIX "C"
COURT OF APPEALS OPINION

March 7, 1990

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

No. 122171

NOLAN K. LUCAS,

(On Remand)

Defendant-Appellant.

Before: Shepherd, P.J., and Gribbs
and Maher, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and sentenced within the guidelines to a term of 44 to 180 months. Defendant appealed by right, and his convictions were reversed by this Court. People v Lucas, 160 Mich App 692; 408 NW2d 431 (1987). Following application to our Supreme Court, this matter has been remanded for our

determination whether the trial court's denial of defendant's motion to introduce evidence regarding past sexual relations between him and the complainant was harmless beyond a reasonable doubt. Accordingly, we have again reviewed the entire record in this matter and we again reverse.

As we noted in our previous opinion, defendant and complainant had a "boyfriend-girlfriend" relationship over a considerable period of time in which they saw each other practically every day. Their relationship experience difficulties only shortly before the incident in question. Virtually all of the evidence in this case consisted of complainant's word against the word of defendant. As this Court suggested in People v Williams, 95 Mich App 1, 10; 289 NW2d 863 (1980), rev'd on oth grds, 416 Mich 25 (1982), the prior instances of sexual relation between these individuals

goes to the issue of credibility. Since the question of credibility was central to this case, we cannot say exclusion of defendant's proposed testimony was harmless beyond a reasonable doubt. People v Robinson, 386 Mich 551, 563; 194 NW2d 709 (1972).

Reversed.

/s/John H. Shepherd

/s/Roman S. Gribbs

/s/Richard M. Maher

APPENDIX "D"

MICHIGAN SUPREME COURT ORDER

Entered: June 5, 1990

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 88649
COA: 122171
(On Remand)
LC: 84-479160

NOLAN K. LUCAS,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

/s/ Corbin R. Davis

Clerk

Seal